No. 83-5509

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES W. PROFFITT,

Cross-Petitioner

v.

LOUIE L. WAINWRIGHT,

Cross-Respondent

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals appears in 685 F. 2d 1227 (11th Cir. 1982). The order modifying its opinion appears at 706 F. 2d 311 (11th Cir. 1983).

As does Cross-Petitioner, Cross-Respondent in the interests of brevity will refer to the appendix of this Cross-Respondent accompanying his Petition for Writ of Certiorari as "A" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

The Cross-Respondent does not question the jurisdictional statement as set out in the Cross-Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

Cross-Respondent denies that Cross-Petitioner had no history of violent behavior in his background. Dr. Daniel J. Sprehe testified at the evidentiary hearing before the

magistrate as follows:

Q. Did Mr. Proffitt, thereafter, during the course of this interview, discuss with you his background, character and so forth?

A. Yes.

Q. Was that used by you in evaluating Mr. Proffitt's psychiatric condition?

A. Yes .

Q. All right. What background did he give you?

A. He told me that his criminal record was that he stole cars five times as a juvenile. That he had done three B and E's and done ninety days -- I don't have it clear in my mind if that was cumulative for one of them in the West.

He had charge of Disturbing the Peace. [sic]

Two times he had been charged with Assault and one time with Assault & Battery.

He also had a ninth grade education. He felt like he could read but couldn't write too well. He was in the Service in 1964 and 1965 and in the Army got an Undesirable Discharge, because of several things; he was AWOL for one week-- they caught him and returned him for six weeks in the stockade. Then he had two fights in the Service for which he received an Article 15-- received one Article 15 for the two fights.

He also lied about his police record to get in the Service; and he stated that the accumulation of all of this; he was discharged on an Undesirable Discharge.

He told me as a child he got in fights a lot. He was known as the "KO Kid" when he was young, and he also used to be called "Stonehead" because he was always hit in the head.

He was a member of a Westside gang known as the "Capones" on the West side of Stanford, Connecticut.

We repeat this testimony of Dr. Sprehe , not because we wish to discuss Cross-Petitioner's character, but because in this Cross-Petition and in his brief in opposition to the Petition for Writ of Certiorari, Proffitt's counsel suggests that Dr. Sprehe inaccurately described Proffitt's history as containing violent behavior and that Dr. Sprehe had relied on inaccurate information. The fact is that Dr. Sprehe relied on information supplied to him by Proffitt himself.

Cross-Respondent also denies that at the time of trial evidence was available that Proffitt was ". . . a non-violent decent man, for whom the murder was a single aberrational act" (cross-petition p. 6).

The fact is that there was little, if any, evidence available which could have been utilized by defense counsel to demonstrate Cross-Petitioner was a non-violent person. The Circuit Court of Appeals summarized the endeavors made by defense counsel in preparation and the various tactical reasons why he did not call certain witnesses. This summarization will not be repeated here but can be found at A-66-68. See also A-380-382.

Cross-Petitioner, of course, argumentatively continues to rely on his so called "proffer" for his assertion that such witnesses were available. But as the District Court observed the "proffer" was filed after the evidentiary hearing. The District Court ruled that this "proffer" was not evidence and it would not be relied upon to support the assertion that certain witnesses were available at the time of trial some five years earlier (A-390-391). The Court of Appeals upheld this ruling (A-60-61).

REASONS FOR DENYING WRIT

We do not believe that either question presents a substantial constitutional question which would justify the granting of certiorari. In the first place, with respect to question one the lower court determined counsel was not ineffective by virtue of any failure to present mitigating evidence because

> [a]lthough the attorney testified that his interpretation of the statute influenced his decision as to what evidence to present at the sentencing hearing, he suggested that other reasons were important as well. In particular, he stated that he believed that he could fit any mitigating evidence within the statutory mitigating factors, id. at 191-92, and that, in any event, the defendant had instructed him not to introduce any mitigating evidence. Id. at 220-221.
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> A-58

Moreover, the District Court outlined the tactical reasons why, as Petitioner's trial counsel testified, many witnesses, such as Petitioner's mother, half brother, wife and sister were not called as mitigating witnesses. (A-381-382)

It is thus abundantly clear that Petitioner seeks certiorari, not so that this court can settle a question of great constitutional import, but in order to have this Court review factual findings made by the court below as to what or why Petitioner's trial counsel did or did not do.

As to Question II Petitioner suggests that in United States v. Raddaty , 447 U.S. 667 (1980) this Court left open the question as to whether a District Judge may reject factual findings made by a magistrate, without rehearing the witnesses.

We disagree. In Raddity this Court said:

> We conclude that the due process rights claimed here are adequately protected by §§ 636(b)(1)(B) and (C). While the district court judge alone acts as the ultimate decisionmaker, the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings. That broad discretion includes hearing the witnesses live to resolve conflicting credibility claims. Finally, we conclude that the statutory scheme includes sufficient procedures to alert the district court whether to exercise its discretion to conduct a hearing and view the witnesses itself.
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> 447 U.S. at 680

The issue which this Court apparently did not reach, but left for a day when it does in fact arise is whether a District Judge may reject a "credibility choice" made by a magistrate Raddity, footnote 7. But the lower court determined there were no credibility choices involved. A-68-71. Since no credibility choices were made this case does not involve any unanswered question.

CONCLUSION

Based on the above and foregoing reasons we do not believe that the Cross-Petition for Writ of Certiorari should be granted.

Nevertheless, since this case presents a classic example of the view that no judgment and sentence, however validly obtained, can withstand the funneled hindsight scrutiny of court after court and judge after judge, years after the fact, we would not hesitate in welcoming an acceptance of this court of the entire case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Respondent, and a member of the Bar of the United States Supreme Court, hereby certify that on this 13th day of October, 1983, I served one copy of the Cross Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on Mr. David S. Golub, Silver, Golub and Sandak, 184 Atlantic Street, P. O. Box 389, Stamford, Connecticut 06904 by a duly addressed addressed envelope with postage prepaid.

OF COUNSEL FOR RESPONDENT